ORIGINAL

(10)

89-539

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF ARIZONA,

Petitioner,

-vs-

ORESTE C. FULMINANTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in applying the totality of the circumstances test to a coerced confession?

2. Can a conviction be allowed to stand that is based on a coerced confession?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Oreste C. Fulminante, through undersigned counsel, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of both the original opinion of the Arizona Supreme Court dated June 16, 1988, and the supplemental opinion of the Arizona Supreme Court dated July 11, 1989.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the first question presented in the petition.

Petitioner contends the Arizona Supreme Court erred in the original opinion by failing to consider the voluntariness of respondent's confession under the "totality of the circumstances" test. Petitioner states:

> . . . the Arizona Supreme Court erroneously relied on Malloy v. Hogan, 378 U.S. 1 (1964) and Bram v. United States, 168 U.S. 532 (1897), in applying a "but-for" test to Fulminante's confession.
> Petition at 14.

This misstates the holding in the original opinion. The Arizona Supreme Court did not apply a "but-for" test, as the court specifically stated:

> . . . the voluntariness of a confession, however, must be viewed in a totality of the circumstances . . .
> Petitioner's Appendix A at 20. (Emphasis added.)

Thus, there is no viable issue regarding the "application of the proper test."

In essence, petitioner contends that this Court should grant certiorari and make its own factual determination as to whether the confession was the result of threats or physical injury or death. It is well established that this Court does "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925). Thus, this Court should not consider this issue.

Even if this Court would determine it is appropriate to analyze the facts, it is unnecessary in this case as it is absolutely clear that the confession was coerced. The majority of the Arizona Supreme Court in the supplemental opinion states:

> . . . it is clear, and we have already expressly held, that the confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess.
> Petitioner's Appendix C at 9.

Justice Cameron, who was the lone dissenter in the supplemental opinion, was the Justice who wrote the original opinion. The

majority notes that in the original opinion Justice Cameron states:

> Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola [government informant] was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover the defendant maintains that Sarivola's promise was "extremely coercive" because the "obvious" inference from the promise was that his life would be in jeopardy if he did not confess. We agree.
> 11 Ariz.Adv.Rep. 7, 10 (June 16, 1988).
> Petitioner's Appendix C at 8-9.

Thus, not only the majority, but even the dissenting Justice stated that respondent's life was in danger if he did not confess. As the majority states:

> This is true coerced confession in every sense of the word.
> Petitioner's Appendix C at 9.

Petitioner asks this Court to find that Fulminante would have confessed even in the absence of the threat of physical harm, and that therefore, the confession was voluntary. Petitioner contends that Fulminante confessed to the government informant solely because they were on friendly terms. The record does not support this contention. Indeed, if this was true, there was no need for the government informant to offer protection from physical harm in exchange for a confession. In any event, this Court should not grant certiorari in order to weigh the facts presented in the trial court.

2. No reason exists for the grant of certiorari on petitioner's second question as this Court has previously ruled on this issue.

Petitioner contends certiorari should be granted to determine if harmless error analysis can be applied where a "true" coerced confession has been admitted at trial. Certiorari need not be granted as this Court has previously ruled on this issue.

The United States Supreme Court has been unequivocal for over 90 years in holding that a conviction cannot be allowed to stand if based in any part on a "coerced" confession. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 578 (1897). This Court has clearly stated this principle in no fewer than 25 opinions.[1] The opinions make it absolutely clear that no matter how sufficient the evidence aside from the confession, the harmless error doctrine cannot apply in such a situation.

In Bram v. United States, this Court discusses the admission of a coerced confession and states:

> If found to have been illegally admitted, reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not

[1] Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 578 (1897); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941); Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), rehearing denied, 323 U.S. 809, 65 S.Ct. 26, 89 L.Ed. 645; Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948); Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949); Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86 (1951); Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), rehearing denied, 343 U.S. 952, 72 S.Ct. 1039, 96 L.Ed. 1353; Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), rehearing denied, 73 S.Ct. 827, two cases, 345 U.S. 946, 97 L.Ed. 1370; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979); Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

prejudicial, because it did not tend to prove guilt. 18 S.Ct. at 186.

Thus, the admission of a coerced confession cannot be harmless error.

This Court has never made exceptions to the above principle. This Court has not stated that a conviction based on a coerced confession may stand if there is a second admissible confession; or if there are ten eyewitnesses; or even if the crime itself was filmed. The principle is absolute. In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), this Court states:

> . . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] . . .
>
> * * *
>
> 8. See, e.g., Payne v. State of Arizona, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (coerced confession) . . . 87 S.Ct. at 827-828. (Emphasis added.)

Wells v. United States, 407 A.2d 1081 (1979) discusses the above principle and states:

> See generally C. McCormick, Evidence Sections 147-50 (2d ed. 1972); 3 J. Wigmore, Evidence Sections 821-26 (Chadbourn rev. 1970). This constitutional tenet is so strong that a conviction, founded in part upon the evidence of an involuntary confession, must be set aside even if the evidence part from the confession was more than sufficient to uphold a jury's verdict of guilt. See, e.g., Malinski v. New York, 324 U.S. 401, 404, 65 S.Ct. 781, 89 L.Ed. 1029 (1945). Although the common law justified the exclusion of coerced confessions on the ground that they were "testimonial untrustworthy," 3 Wigmore, supra Section 822, the decision under the Constitution have eschewed strict reliance upon this rationale in favor of the due process guaranty, See Ritz, Twenty-five Years of State Criminal Confession of Cases in the U.S. Supreme Court, 19 Wash. & Lee L.Rev. 35, 43-51 (1962). Thus the Supreme Court has held that an involuntary confession is inadmissible without regard to its truth or falsity. Rogers v. Richmond, 365 U.S. 534, 540-41, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). . . .
> 407 A.2d at 1085.

The United States Supreme Court has held in five cases that where a coerced confession is admitted at trial, it is irrelevant if there are other properly admitted confessions. Haynes v.

Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), rehearing denied 343 U.S. 952, 72 S.Ct. 1039, 96 L.Ed. 1353; Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975.

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), involves a situation where a "coerced" confession was admitted at trial. In that case, this Court states:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, . . . and even though there is ample evidence aside from the confession to support the conviction.
> 84 S.Ct. at 1780. (Emphasis added.)

This Court goes on to state:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," . . .
> 84 S.Ct. at 1785.

In Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), this Court states:

> Statements made by a defendant in circumstances violating the strictures of Miranda v. Arizona, supra, are admissible for impeachment if their "trustworthiness . . . satisfied legal standards." . . . But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, "even though there is ample evidence aside from the confession to support the conviction" . . . If therefore, Mincey's statements to Detective Hust were not 'the product of a rational intellect and a free will,'" . . . his conviction cannot stand. . . .
> 98 S.Ct. at 2416. (Emphasis added.)

Thus, this Court has made it extremely clear that although a confession obtained solely in violation of Miranda may be used at

trial for limited purposes, a conviction cannot be allowed to stand if a "coerced" confession is admitted at trial. In other words, admission of a "coerced" confession cannot be harmless error no matter how overwhelming the evidence against a defendant. This is true even if a second confession constitutes part of that overwhelming evidence.

In Lynumn v. Illinois, 372 U.S. 527, 83 S.Ct. 917, 9 L.Ed.2d 922, the defendant was convicted after a coerced confession was admitted at trial. The United States Supreme Court notes that the Illinois Supreme Court had previously held that even if the confession was erroneously admitted, "the error was a harmless one" in light of other evidence of the defendant's guilt. This Court then states:

> That is an impermissible doctrine. As was said in Payne v. Arkansas, "this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."
> 356 U.S. 560, at 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975. 83 S.Ct. at 922.

Therefore, it is clear that the harmless error doctrine cannot be applied to the instant case.

In the 1986 case, Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460, this Court states:

> Despite the strong interests that support the harmless-error doctrine, the Court in Chapman recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U.S. at 23, n. 8, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065, citing Payne v. Arkansas, . . . (introduction of coerced confession) . . . This limitation recognizes that some errors necessarily render a trial fundamentally unfair.
> 92 L.Ed.2d 470. (Emphasis added.)

In a concurring opinion, Justice Stevens states:

> [V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial. .

> . . The admission of a coerced confession can never be harmless even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming.[3]
>
> * * *
>
> 3. See Payne v. Arkansas . . . ("[T]his Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment") . . .
> 92 L.Ed.2d at 476-77. (Emphasis added.)

The opinion continues:

> In short, as the Court has recently emphasized, our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination.
> Id. at 477. (Footnote omitted.)

Rose v. Clark, again makes it absolutely clear that a conviction has to be vacated if a coerced confession is admitted at trial no matter how overwhelming the other evidence. There clearly is no exception to this rule.

In Haynes v. Washington, a coerced confession was admitted at trial of a defendant on a robbery charge. This Court stated that "substantial independent evidence" of guilt existed apart from the coerced confession. This evidence included two prior confessions by the defendant which were determined to be admissible, and identification of defendant as one of the robbers by eyewitnesses. Despite the two admissible confessions, this Court held that the convictions had to be vacated because of the admission of the coerced confession.

In reaching its decision in Haynes, this Court considered its prior holding in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, in which a coerced confession was admitted at trial. In Rogers, this Court states:

> Our decisions under that Amendment [Fourteenth] have made it clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the

> product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system -- a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. See Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166; Rochin v. People of California, 342 U.S. 165, 172-174, 72 S.Ct. 205, 209-210, 96 L.Ed. 183; Spano v. People of State of New York . . . Blackburn v. State of Alabama, 361 U.S. 199, 206-207, 80 S.Ct. 274, 279-280, 4 L.Ed.2d 242. And see Watts v. State of Indiana, 338 U.S. 49, 54-55, 69 S.Ct. 1347, 1350, 1357, 93 L.Ed. 1801. 81 S.Ct. at 739-40.

This Court goes on to state:

> To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.
> Id. at 740.

Accordingly, the conviction in Rogers was vacated because of the admission of the coerced confession.

Stroble v. California, involves a trial in which an alleged coerced confession was admitted. The California Supreme Court had previously determined that the confession was involuntary, but that the confession "could not have affected the fairness of [petitioner's] trial," because petitioner "thereafter made at least five confessions of materially similar substance and unquestioned admissibility, which were put in evidence." The California Court

went on to state that "[i]t does not appear the outcome of the trial would have differed" if the coerced confession had been excluded. 72 S.Ct. at 603. Therefore, the California Court concluded that the use of the confession had not deprived petitioner of due process.

Despite the five admissible confessions, the United States Supreme Court in Stroble states:

> If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict. Malinski v. New York, 1945, Lyons v. Oklahoma, 1944, 322 U.S. 596, 597 note 1, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481.
> Id. at 603.

Thus, this Court has made it absolutely clear that a conviction must be vacated if a coerced confession is admitted at trial even if there are five additional voluntary confessions properly admitted at trial. Therefore, in the instant case, the convictions should be reversed even though a second purportedly voluntary confession was admitted at trial.

In Malinski v. New York, the defendant was convicted of the murder of a police officer. Testimony was presented at trial that prior to his arrest, the defendant made confessions to his girlfriend, his brother-in-law and to a friend of the defendant's. There was no dispute that these confessions were voluntary and properly admitted at trial.

After defendant's arrest, the police obtained two alleged coerced confessions from him. The United States Supreme Court specifically found that the first police confession was coerced. At trial, subsequent confessions were also admitted. The admissibility of these confessions was not in dispute.

The New York Court of Appeals had previously found that the unchallenged confessions and other evidence were sufficient to

support the conviction wholly apart from the contested confession. The United States Supreme Court clearly found the above finding to be irrelevant, stating:

> If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, page 154 of 322 U.S., page 926 of 64 S.Ct., 88 L.Ed. 1192. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U.S. 596, 597, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481. 65 S.Ct. at 783.

This Court goes on to state:

> It is thus apparent that the judgment before us rests in part on a confession obtained as a result of coercion. Accordingly a majority of the Court do not come to the question whether the subsequent confessions were free from the infirmities of the first one. Id. at 786.

Accordingly, the judgment against Malinski was vacated. Thus, the conviction of the instant case should also be vacated.

In Spano v. New York, the defendant was charged with shooting the victim to death. Prior to arrest, the defendant telephoned a close friend who was attending the police academy and told him that the defendant had received a "terrific beating" from the victim. The defendant then confessed that "he went and shot at him [victim]." As there was no dispute that the victim was shot to death, the above statement constituted a full confession. There was also an eyewitness who testified that the defendant had murdered the victim.

After the defendant's arrest, the police obtained a second, "coerced," confession which was admitted at trial. This Court notes:

> The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evidence in the record from which the jury might have found guilt . . . 79 S.Ct. at 1208.

Indeed, the evidence of guilt in Spano was overwhelming even in the absence of the second "coerced" confession. The first confession and the eyewitness testimony was "sufficient other evidence in the record from which the jury might have found guilt."

Despite the overwhelming evidence of guilt, this Court held that the conviction had to be reversed, because a coerced confession was admitted at trial. This Court states:

> [W]e find the use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.
>
> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. 79 S.Ct. at 1205-6.

The holding in Spano makes it absolutely clear that in the instant case, even though there was a second allegedly voluntary confession, the conviction must still be reversed.

In Chapman v. California, the United States Supreme Court notes that under the holding in Payne v. Arkansas, admission of a coerced confession can never be considered harmless error. In his concurring opinion in Chapman, Justice Stewart states that the inapplicability of the harmless error rule to coerced confessions does not turn on their evidentiary impact. Rather, the constitutional right involved is so fundamental and absolute that it will not permit courts to indulge in nice calculations as to the harm arising from its denial.

In Payne v. Arkansas, this Court held that a conviction had to be vacated because a "coerced" confession had been admitted at trial. This Court held that the admission of the coerced confession vitiates the judgment of guilt because it violates the

Due Process Clause of the Fourteenth Amendment. After retrial, the case was considered on appeal by the Supreme Court of Arkansas. Payne v. State, 332 S.W.2d 233 (1960). The Arkansas Court discusses the fact that aside from the first "coerced" confession, there was a reenactment of the crime which constituted a second confession. 332 S.W.2d at 235. The dissenting opinion notes that in the United States Supreme Court opinion in Payne v. Arkansas, there is no mention whatsoever of the second confession. 332 S.W.2d at 236.

The state court in Payne considered the issue of whether or not the second confession was voluntary and thus admissible at trial. Obviously, as the United States Supreme Court did not discuss the second confession at all, this Court was not concerned whether the second confession was voluntary. In light of this fact and the fact that this Court vacated the conviction, the only logical conclusion is that this Court held that the conviction based on a coerced confession had to be vacated even if there was a second admissible confession.

Petitioner relies upon the dissent of Justice Cameron in the supplemental opinion of the Arizona Supreme Court. Justice Cameron wrote the original opinion in which he erroneously equated confessions obtained as a result of physical coercion with Miranda violations. The majority in the supplemental opinion notes that in the original opinion, the cases relied upon by Justice Cameron to support a harmless error analysis:

> . . . were not cases in which the first confession was a coerced confession in violation of defendant's fifth amendment rights. Instead, these cases involved confessions obtained in violation of defendant's Miranda rights.
> Petitioner's Appendix C at 4.

It is also clear that Justice Cameron's later "authority" does not support petitioner's position.

CONCLUSION

As neither the decision below nor the record raises the first question presented in the petition and as this Court has previously ruled on the second question presented, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for RESPONDENT

CERTIFICATE OF SERVICE

STEPHEN R. COLLINS, being first duly sworn upon oath, deposes and says:

That he served the attorneys for the petitioner in the foregoing case by forwarding 3 copies of the **RESPONDENT'S BRIEF IN OPPOSITION**, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

ROBERT K. CORBIN
JESSICA GIFFORD FUNKHOUSER
BARBARA M. JARRETT
Attorney General of the State of Arizona
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Attorneys for Petitioner

this 15th day of December, 1989.

Stephen R. Collins
STEPHEN R. COLLINS

SUBSCRIBED AND SWORN to before me this 15th day of December, 1989.

Brenda Birkhimer
BRENDA BIRKHIMER
NOTARY PUBLIC

My Commission Expires:
My Commission Expires June 29, 1991